Litigation Section of The State Bar of California

Litigation Update

Litigation Section News

December 2004

Primary assumption of risk is again before the Supreme Court. In our July newsletter, we noted that *Priebe v. Nelson* (First App. Dist., Div. 4, June 8, 2004) 119 Cal.App.4th 235, [14 Cal.Rptr.3d 173] affirmed application of the doctrine of primary assumption of risk where a kennel worker was injured by a dog bite. The California Supreme Court has granted hearing and the case may no longer be cited. More on the doctrine later.

A trap for the unwary: time for appeal starts when clerk files minute order dismissing the action based on forum nonconveniens. Anyone confronted with an order dismissing a case either on the basis of inconvenient forum or on the basis of a forum selection clause had better read *Quest International, Inc. v. Icode Corp.* (Cal.App. Fourth Dist., Div. 3; September 22, 2004) 122 Cal.App.4th 745, [19 Cal.Rptr.3d 173, 2004 DJDAR 11907]. In nearly all cases, an appeal only lies after the judge signs and files the order or judgment. The time for filing a notice of appeal is measured from the date of notice or service of the signed judgment or order. Not so for an order dismissing an action for forum nonconveniens. As the appellant in *Quest* discovered to its distress, the peculiarity of the statute (*Code Civ. Proc.*, § 904.1 (a)(3)) makes an unsigned minute order granting a motion to dismiss for inconvenient forum directly appealable. As a result, the court may not consider a motion for reconsideration (a motion for new trial would be the appropriate procedure) and time limits for appeal start with notice or service of the minute order. In *Quest* the appellant waited until the judge signed a formal order and by that time it was too late and the appellate court lacked jurisdiction to consider the appeal.

When you tell the court you will be there, you had better show up. If you are scheduled for argument before the California Supreme Court and your boss fires you days before the hearing, you may not assume that she or he will send someone else. In *In re Aguilar and Kent On Contempt* (Cal.Supr.Ct.; September 23, 2004) 34 Cal.4th 386, [97 P.3d 815, 18 Cal.Rptr.3d 874, 2004 DJDAR 11919], Aguilar and his associate Kent had advised the court that they would appear for oral argument. Neither showed up. Aguilar, who had fired Kent five days before the hearing, subsequently compounded his offense by lying to the court to explain his absence. All justices agreed in holding Aguilar in contempt, fined him $1,000, and ordered he be referred to the State Bar for disciplinary action. The majority also found Kent in contempt and fined him $250; holding his duties to the court did not end when his boss fired him.

Even winning does not entitle every "private attorney general" to fees. *California Code of Civil Procedure* § 1021.5 provides for an award of attorney fees to the successful plaintiff in cases resulting in "the enforcement of an important right affecting the public interest." (The statute is commonly referred to as the "private attorney general statute.) There has been much publicity about the misuse of this statute in actions under *Bus. & Prof. Code*, § 17200 (*Unfair Trade Practices Act*). *In Baxter v. Salutory Sportsclubs, Inc.* (Cal.App. First Dist., Div. 3; September 28, 2004) 122 Cal.App.4th 941, [2004 DJDAR 12115] the successful litigant was denied fees because the court concluded that the public benefit derived from the successful litigation was too miniscule to constitute "an important right affecting the public interest." Although the plaintiff established that there were discrepancies between defendant's form contract and the requirements of the Health Clubs Contracts Statute (*Civ. Code* §§ 1812.80 ff.), the contract form complied with "the spirit of the statute" and no-one was damaged by the very minor deviation from the requirements of the statute.

Even judges can tell when a defect is trivial. In *Caloroso v. Hathaway* (Cal.App. Second Dist.; September 28, 2004) 122 Cal.App.4th 922, [19 Cal.Rptr.3d 254, 2004 DJDAR 12118] the trial court awarded summary judgment to a defendant sued in a trip-and-fall case. The court refused to consider plaintiff's expert, who opined the defect was dangerous, and decided, as a matter of law, that an elevation difference of seven-sixteenths of an inch along a sidewalk crack was so trivial as not to impose a duty on the adjoining landowner to warn pedestrians. The Court of Appeal affirmed and concluded that reasonable minds could not differ on the issue of whether such a defect was trivial. *Also see, Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, [139 Cal.Rptr. 876].

Litigation Section Events

Section Education Institute

January 28–30, 2005
Palace Hotel
San Francisco, CA

See Website for Details:
www.calbar.ca.gov/SEI

Annual Trial Symposium

April 15–17, 2005
Silverado Country Club and Resort
Napa Valley, CA

Details Available on Website Soon

However, in a somewhat similar situation, a plaintiff in a slip-and-fall case fared better. In *Martinez v. Chippewa Enterprises, Inc.* (Cal.App. Second Dist., Div. 8; August 26, 2004) 121 Cal.App.4th 1179, [18 Cal.Rptr.3d 152, 2004 DJDAR 10677], the trial court granted summary judgment against a plaintiff who had slipped on wet cement because "the existence of water on concrete or asphalt located outdoors is an open and obvious condition" and thus cannot provide a basis for liability. The Court of Appeal agreed with the first of these conclusions but rejected the latter, noting that "the obviousness of a condition does not necessarily excuse the potential duty of a landowner, not simply to warn of the condition but to rectify it."

No rush to get your will witnessed. In *Estate of Sauressig* (Cal.App. Second Dist., Div. 4; September 29, 2004) 122 Cal.App.4th 1086, [19 Cal.Rptr.3d 262, 2004 DJDAR 12163], the court held that a witness to the signing of a will may attest to that fact by signing the will after the testator has died. Presumably the same rule does not apply to the testator.

Court was called upon to define "is." (Although the case did not involve a former president.) One defendant was quoted in a magazine article as having said "our dad's a pimp." Dad did not take kindly to this characterization. Nor did he appreciate the other defendant having stated that their father had "dabbled in the pimptorial arts." Dad sued and, although he did not deny that in his past he might have acted as a procurer, he argued that the statements were nevertheless liable because he had long ago forsaken this calling. The jury was less than sympathetic to dad's plight and absolved the sons of liability. Dad appealed. But the Court of Appeal was no more sympathetic to his cause and affirmed the judgment. It concluded that the two statements could reasonably be interpreted as describing dad's former profession rather than his present one. The court concluded that although one interpretation of the phrase "dad's" might be "dad is," it was just as reasonable to interpret it as "dad was." *See, Hughes v. Hughes* (Cal.App. Second Dist., Div. 5; September 28, 2004) 122 Cal.App.4th 931, [19 Cal.Rptr.3d 247, 2004 DJDAR 12120].

Preprinted workers' compensation release form does not release civil claims. Plaintiffs who file actions for harassment, discrimination, and wrongful termination, claims often file contemporaneously related workers' compensation claims. When the latter are settled, the form used to stipulate to the compromise contains broad release language which arguably encompasses the civil claim as well as the workers' compensation claim. In *Claxton v. Waters* (Cal.Supr.Ct.; August 30, 2004) 34 Cal.4th 367, [18 Cal.Rptr.3d 246, 2004 DJDAR 10728], our Supreme Court held that these forms are not to be interpreted as including a release of the civil claim and prohibited the introduction of extrinsic evidence to show that the parties intended to settle both sets of claims. If the settlement is intended to be global, the parties must do so by means of a separate waiver and release form. Note: The ruling in *Claxton* is prospective only. For releases signed before the court issued its opinion, the courts may use extrinsic evidence to determine the intent of the parties to the settlement agreement.

Contractual venue selection clauses are void. As distinguished from forum selection clauses, which the courts generally enforce, parties cannot by their contracts designate a particular county for venue. *See, Arntz Builders v. Superior Court* (Cal.App. First Dist., Div. 3; September 30, 2004) 122 Cal.App.4th 1195, [2004 DJDAR 12211].

Five-year limitation for bringing cases to trial is suspended when mediation occurs during last six months of the limitation period. Before trial courts started to manage their cases under the *Trial Court Delay Reduction Act*, the statute providing for dismissal in cases not brought to trial within five years (*Civ. Proc.* § 583.310 (a)) provided a rich source of appellate opinions. Now the statute is rarely invoked. But, it is still with us. In *Gonzalez v. County of Los Angeles* (Cal.App. Second Dist., Div. 1; September 30, 2004) 122 Cal.App.4th 1124, [2004 DJDAR 12228], the Second District Court of Appeal reminded us that the statute is tolled under *Code Civ. Proc.*, § 1775.7 (b) when court-ordered mediation occurs during the last six months of the limitation period.

Take care when drafting a statutory offer to compromise. In order to qualify under *Code Civ. Proc.* § 998, a statutory offer to compromise must be unconditional. Where the offer was conditioned upon a joint acceptance by two plaintiffs, defendant was not entitled to recover the penalties provided under the statute, even though the verdict was for less than the amount offered. *Menees v. Andrews* (Cal. App. Fifth Dist.; October 13, 2004) 122 Cal.App.4th 1540, [19 Cal.Rptr.3d 664, 2004 DJDAR 12554].

Lis pendens is only available where pleading describes a specific property. *California Code of Civil Procedure* § 405 *et seq*. govern the recording of a *lis pendens* where a pending action claims an interest in real property. Section 405.4 defines a "real property claim" as "causes of action in a pleading which would, if meritorious, affect (a) title to, or the right to possession of, specific real property, or (b) the use of an easement identified in the pleading…." Because the statute requires that the claim relate to "specific real property," a divorce complaint that merely alleges an interest in real property, without describing the specific property subject to the claim, does not permit the recording of a *lis pendens*. *Gale v. Superior Court* (Cal. App. Fourth Dist.; Div.

Discussion Board Participation

We are having great participation on our State Bar Litigation Section Bulletin Board. Join in on the exciting discussions and post your own issues for discussion. Our Board is quickly becoming "The Place" for litigators to air issues all of us are dealing with. Go to: www.Calbar.ca.gov to explore the new bulletin board feature—just another benefit of Litigation Section membership.

3, October 6, 2004) 122 Cal.App.4th 1388, [19 Cal.Rptr.3d 554, 2004 DJDAR 12403], (as modified Oct. 22, 2004).

Another exception to the "absolute" mediation privilege: agreement to arbitrate. In October we reported that *Fair v. Bakhtiari* (2004) 122 Cal.App.4th 1457, [19 Cal.Rptr.3d 591] held that the absolute mediation privilege applied to materials prepared in connection with a mediation did not apply to settlement agreements entered into during mediation, as long as the agreement reflected the intention of the parties that it be enforceable and binding. The Court of Appeal for the First District has now held that the same exception to the privilege applies to an agreement to arbitrate negotiated during a mediation, holding that such an agreement was in fact a "settlement agreement." *Fair v. Stonesfair Financial Corporation* (*Bakhtiari*) (Cal. App. First Dist., Div 2,; October 12, 2004) 122 Cal.App.4th 1457, [19 Cal.Rptr.3d 591, 2004 DJDAR 12532].

Local ordinance may not punish litigant for exercising right to bring suit. A Santa Monica city ordinance on "tenant harassment" purported to limit the right of landlords to bring unlawful detainer actions. Because the ordinance sought to punish landlords for initiating a legal action, it violated the litigation privilege created by *California Civil Code* § 47 (b). *See, Action Apartment Assn., Inc. v. City of Santa Monica* (Cal. App. Second Dist., Div. 5, October 15, 2004) 123 Cal.App.4th 47, [19 Cal.Rptr.3d 742, 2004 DJDAR 12663].

To obtain continuance of summary judgment motion, specific facts must be shown. A superficial reading of *California Code of Civil Procedure* § 437c (h) might lead to the conclusion that a party opposing a motion for summary judgment is entitled to a continuance to conduct further discovery. Not necessarily so! A declaration in support of the motion to continue the hearing is required and it must (1) identify the facts to be obtained from the contemplated discovery, (2) include a showing that there is reason to believe these facts exist, and (3) explain why additional time is needed to obtain these facts. The continuance may be denied if the party seeking the continuance has failed to exercise diligence in obtaining the discovery. *Cooksey v. Alexakis* (Cal. App. Second Dist.; Div. 5, October 21, 2004) 123 Cal.App.4th 246, [19 Cal.Rptr.3d 810, 2004 DJDAR 12850]; *see also, Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 548, [30 Cal.Rptr.2d 706, 716]; and Weil & Brown, *Civil Procedure Before Trial*, Ch.10, §§ 10:207.15–10:208.

The statute requiring dismissal for failure to bring a case to trial within five years is alive and well. *California Code of Civil Procedure* § 583.310(a) requires that a case be dismissed unless brought to trial within five years from the date the original complaint was filed. In this day of judge-managed litigation, cases rarely linger this long. Before implementation of the *Trial Court Delay Reduction Act*, this statute was frequently litigated and the Courts of Appeal issued many opinions dealing with exceptions and implementation of the statute. (*See*, Weil & Brown, *Civil Procedure Before Trial*, Ch.11, §§ 11:191-11:266.2.) But, the statute is still with us and during the last three years, a dozen published and almost 70 unpublished appellate decisions have dealt with the statute. For example, *Sagi Plumbing v. Chartered Construction Corp.* (Cal. App. Second Dist., Div. 4; October 25, 2004) 123 Cal.App.4th 443, [19 Cal.Rptr.3d 835, 2004 DJDAR 12993], (as modified November 10, 2004), applied the statute to affirm the dismissal of a number of causes of action that had not been brought to trial within five years, even though, there had been an earlier trial on a separate cause of action that had commenced well before the five years had run.

Note Discretionary Two Year Dismissal: *California Code of Civil Procedure* § 583.410, also provides for a discretionary dismissal for delay in failing to bring a case to trial within two years from date of filing. Lack of diligence by plaintiff's lawyer in getting a case ready for trial may result in a dismissal after two years.

No mechanics lien until the physical work has started. Contractors did almost $1,000,000 worth of design work but the construction never started. They filed a mechanic's lien. The superior court conditioned a release of the lien on the posting of a bond and the property owner filed a petition for writ of mandate. Petition was granted. "For a mechanic's lien to attach, there must be 'actual visible work on the land or the delivery of construction material thereto.'" *D'Orsay International Partners v. Superior Court* (Cal. App. Second Dist., Div. 3; October 29, 2004) 123 Cal.App.4th 836, [2004 DJDAR 13279]; *see also, Walker v. Lytton Sav. & Loan Assn.* (1970) 2 Cal.3d 152, [465 P.2d 497, 84 Cal.Rptr. 521].

Create Your Member Profile On-line

Watch for your access code in your mail, or obtain it from your State Bar dues statement. Then go on-line to create your profile and customize your interests. www.calbar.org

Jury Instructions

We would like to hear about any problems or experiences you've had with the new jury instructions. Please provide your comments by sending them to Paul Renne at PRenne@cooley.com or to Rick Seabolt at RLSeabolt@HRBlaw.com